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the court either to dismiss the bill, or retain it for the purpose of administering the trust. If there are conflicting interests between the parties as to their respective rights and interests, they should be decided, and a decree made for the sale of the property and the proper application of the proceeds. But whether the discretion vested in the court has been soundly exercised or not depends upon the facts and circumstances of the particular case.

MOUNT V. RADFORD TRUST CO. AND OTHERS.—Decided at Wytheville, July 23, 1896.—*Buchanan, J.* Absent, *Harrison, J.* :

1. **CHANCERY PLEADING**—*Suit by stockholder on right of action in corporation.* A stockholder in a corporation has no right to bring a suit in equity in his own name, or for the benefit of himself and other stockholders, upon a cause of action existing in the corporation, and in which the corporation is itself the proper complainant, except where it actually or virtually refuses to institute or prosecute the suit. It must be averred and proved that application was made to the proper authorities to institute suit and they refused, or that such a state of facts exists that the application itself would be useless, or the facts charged must be such as to show that it is reasonably certain that a suit by the corporation would be impossible. But the suit, when brought, is still the suit of the corporation; the stockholder being permitted to sue in this manner simply to set in motion the judicial machinery of the court.

2. **INJUNCTIONS**—*Motion to dissolve in vacation—Hearing on merits.* Upon a motion in vacation to dissolve an injunction, it is error for the court to proceed to hear the case on its merits, and dismiss the bill, in the absence of the consent of record required by the statute. The injunction may be dissolved in vacation, but the hearing on the merits should stand over until the term.

ENGLEBY AND OTHERS V. HARVEY.—Decided at Wytheville, July 23, 1896.—*Riely, J.* Absent, *Harrison, J.* :

1. **CONTRACTS**—*Entire promise—Statute of frauds—Case at bar.* Where a verbal contract is entire, and relates in part to a matter which renders it necessary under the statute of frauds that the promise should be in writing, the whole promise is void. In the case at bar the promise which is relied on as the basis of the suit was made by an agent without evidence that he was authorized to make any such promise, or that it was at all within the scope of his duties or employment. Furthermore, it was the verbal promise of one to pay the debt of another. The evidence does not support the allegation that the two parties were partners, or joint contractors.

2. **FRAUD MUST BE PROVED**—*Innocence presumed—Case at bar.* He who alleges fraud must, except in a particular class of cases, clearly and distinctly prove it. The law never presumes fraud, but the presumption is always in favor of innocence, and not of guilt. In the case at bar, the assignment by the sub-contractor to another of the amount coming to him under the contract, in order to enable the sub-contractor to raise money to carry on that and other jobs, furnishes no ground for a claim of an intended fraud on a lumberman whose debt had not been created at the date of the assignment, though under a contract with

the general contractor the lumberman subsequently furnished him lumber which was used by the sub-contractor in doing the work.

DUPUY & WIFE V. EASTERN BUILDING & LOAN ASSOCIATION.—

Decided at Wytheville, July 30, 1896.—*Keith, P.* Absent, *Harrison, J.*

1. BUILDING FUND ASSOCIATION—*Fines—Waiver by by-laws.* If the charter of a building fund association confers upon the association, by way of privilege and not as a duty, the power to impose certain fines on delinquent stockholders, the Association may enact by-laws diminishing the fines, and will be regarded as having waived to this extent the power conferred by the charter, and the courts will enforce only the lesser penalty.

2. BUILDING FUND ASSOCIATIONS—*Fines—Case at bar—Construction of by-law.* Under a by-law which provides that "borrowing members who shall neglect to pay any installments as the same become due, shall pay to the association a fine of twenty cents per month on each \$100 that they have borrowed from the association," the fine for the first and each succeeding month of default is limited to twenty cents on the \$100 borrowed.

STATE SAVINGS BANK AND ANOTHER V. STEWART.—Decided at

Wytheville, July 30, 1896.—*Buchanan, J.* Absent, *Harrison, J.*

1. DEEDS—*Repugnant descriptions—Intention of parties—Case at bar.* A false description does not render a deed or other writing inoperative, if, after rejecting what is false there remains a sufficient description to ascertain with legal certainty the subject matter to which the instrument applies. And if two descriptions be given, each equally explicit, but repugnant to each other, that description will prevail which the whole deed shows best expresses the intention of the parties. The court will also look to the surrounding facts, and will adopt that description, if certain and definite, which, in the light of such facts, will most effectually carry out the intention of the parties. In the case at bar there were two repugnant descriptions, but the grantor owned the lots answering to only one of them, and it was with reference to these lots that the parties dealt. This description, being definite and certain, should be adopted, and the deed of the grantor declared operative to convey the lots so described.

2. DEED—*Effect of reference to a map for description.* Where a map of land is referred to in a deed for the purpose of fixing its boundaries, the effect is the same as if it were copied into the deed.

3. DEEDS—*Description of land—Position in deed of true and false description.* It is immaterial whether the true or the false description of land be placed first. The courts will reject the false wherever found, and give effect to the intention of the parties when so expressed as to enable the premises intended to be conveyed to be identified.

HESS, BY & C. V. GALE.—Decided at Wytheville, July 30, 1896.—

Keith, P. Absent, *Harrison, J.*

1. DOWER—*Insane wife—Wife should be a party to proceedings under sec. 2625 of Code.* The husband of an insane wife cannot by proceeding on an *ex parte* petition